No. 16522

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE JAMES M. CARTER, RESPONDENT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

W. WILSON WHITE,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

HAROLD H. GREENE,
GERALD P. CHOPPIN,
Attorneys,
Department of Justice.
Attorneys for Petitioner

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In the United States Court of Appeals
for the Ninth Circuit

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

HONORABLE JAMES M. CARTER, RESPONDENT

BRIEF FOR PETITIONER

JURISDICTIONAL STATEMENT

1. The jurisdiction of this Court is based on the All Writs Act, 28 U.S.C. 1651, which provides:

> *Writs.* (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

There is no time limit set out in the All Writs Act or in any other statute for the filing of a writ of mandamus.[1] Furthermore, Rule 35 of the Rules of

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[1] The Reporter's Transcript of Proceedings at the time of the hearing on the motion to correct sentences is dated May 30, 1959 and was not received by the Petitioner until June 5, 1959.

Criminal Procedure states: "The court may correct an illegal sentence at any time." Since a court may of its own correct an illegal sentence at any time, it follows that it may be ordered to correct an illegal sentence at any time.

2. An appeal from the order of Judge Carter would not lie in these cases. The statute which sets out the grounds on which the United States may appeal from an adverse decision in a criminal case is the Criminal Appeals Act, 18 U.S.C. 3731, which provides as follows:

> *Appeal by United States.*—An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> An appeal may be taken by and on behalf of the United States from the district court to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

Appeals in criminal cases may not be taken by the Government unless authorized by the Criminal Appeals Act. *United States* v. *Borden Co.*, 308 U.S. 188 (1939); *United States* v. *Rosenwasser*, 145 F.2d 1015 (C.A. 9, 1944); *United States* v. *Socony Mobil Oil Company*, 252 F.2d 420 (C.A. 1, 1958). There is no provision in that Act for an appeal from an order suspending sentence and granting probation, or from the denial of a motion to correct sentence.

The fact that there is no right of appeal by the Government does not preclude the issuance of a writ of mandamus as an exercise of appellate jurisdiction. In *United States* v. *United States District Court for the Southern District of New York*, 334 U.S. 258, 263 (1947), the Court stated:

> It was early recognized that the power to issue a mandamus extended to cases where its issuance was either an exercise of appellate jurisdiction or in aid of appellate jurisdiction. * * * That power protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it not be immediately and directly involved. * * *
>
> But the fact that mandamus is clearly connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate. * * *

STATEMENT OF THE CASE

On May 27, 1958, at San Diego, California, an information was filed pursuant to waiver of indictment executed by each defendant, charging Robert

Emil Austin, age 19, and Albert F. Smithson, Jr., age 19 (as of July, 1958), with a violation of Title 21, United States Code, section 176(a) (smuggling of marihuana). Both defendants pleaded guilty, and on June 16, 1958, Judge Carter, acting pursuant to the provisions of the Youth Corrections Act, 18 U.S.C. 5010(a), suspended the sentences and placed the defendants on probation for a period of five years. Copies of the information and of the Judge's order finding the defendants guilty but suspending sentence and placing them on probation are annexed in the appendix to this brief, marked Exhibits "A", "B", and "C", respectively.[2]

On November 24, 1958, at San Diego, California, an information was filed pursuant to a waiver of indictment executed by the defendant, charging Jean Helen Feaux, age 19, with a violation of Title 21, United States Code, section 174 (illegal importation of narcotics). Miss Feaux entered a plea of guilty, and on March 30, 1959, Judge Carter found her guilty and suspended sentence, placing her on probation for five years, again citing the Youth Corrections Act as his authority. Copies of the information and the Judge's order are annexed in the appendix to this petition, marked Exhibits "D", and "E", respectively.

In both cases the Government filed motions to correct sentence. Judge Carter denied the motions in orders handed down March 30, 1959. Copies of the order, as well as of Points and Authorities in

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[2] One set of certified copies of each of the exhibits "A" through "K" is being filed in this action with the Petition.

Opposition to the Motion to Set Aside the Judgment and Correct an Illegal Sentence, filed by defendant Austin (defendant Smithson filed no written opposition); of Points and Authorities in Support of Application for Probation Under the Youth Corrections Act, filed by defendant Feaux; and of Notice of Opposition to Defendant's Request for Probation and supporting memorandum, filed by the Government, are annexed in the appendix to this brief, marked Exhibits "F", "G", "H", "J", and "K", respectively.

ARGUMENT

I

Under The All Writs Act This Court Has the Power to Supervise the Exercise of Jurisdiction of Courts Within Its Appellate Jurisdiction by a Writ of Mandamus.

The issuance of the writ of mandamus in these cases is sought under the authority of the "All Writs Act". The power of the Court of Appeals to grant these writs under the Act to review orders of lower courts was recognized by the Supreme Court in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1956). In that case, the Court affirmed the use of mandamus by the Court of Appeals to prevent a District Judge from referring a lengthy antitrust case to a master to relieve his crowded docket. The Court found that the complexity of the case compelled the use of a trial, that a master might be used only to fix damages after the court had determined the overall liability of defendants, and that therefore the Court of Appeals was correct in granting the writ of mandamus. "We believe that supervisory control of the

District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system." 352 U.S. at 259-260. The rule of the *La Buy* case is especially applicable to the instant problem, for the case here involves not merely an error in timing by a judge as to when he may submit an antitrust case to a master, but rather the refusal of the trial court to apply the clear terms of a statute. The writ may of course issue to confine an inferior court to a lawful exercise of its prescribed jurisdiction (*Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21 (1942)) and its use for that purpose is discretionary with the appellate court. *La Buy, supra.*[3]

An example of the use of mandamus to correct errors such as those in these two cases may be found in *Ex parte United States*, 242 U.S. 27 (1916) where the Court granted the writ to set aside an order of the trial court suspending sentence in an embezzlement case when the mandatory minimum sentence was five years. Speaking of the obligation of the court to sentence, the Court said (242 U.S. at 42):

> . . . if it be that the plain legislative command fixing a specific punishment for crime is subject to be permanently set aside by an implied judi-

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[3] The Court also specified in *La Buy* that the writ was to be "in aid of jurisdiction". *Ibid.*, p. 255. In one of the early cases involving the use of the writ of mandamus, Chief Justice Marshall supplied a guide for defining these terms: "A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction." *Ex parte Crane*, 5 Peters 190, 193 (1831). See also, *United States* v. *United States District Court for the Southern District of New York, supra.*

> cial power upon considerations extraneous to the legality of the conviction, it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal. And thus it would come to pass that the possession by the judicial department of power to permanently refuse to enforce a law would result in the destruction of the conceded powers of the other departments and hence leave no law to be enforced.

With respect specifically to an unlawful exercise of jurisdiction, see *United States* v. *Albrecht*, 25 F.2d 93 (C.A. 7, 1928); and see also, *United States* v. *Akerman*, 61 F.2d 570 (C.A. 5, 1932).

II

The Youth Corrections Act Does Not Contain a New Grant of Power to Suspend Sentence and Place an Offender on Probation.

As his authority to suspend sentence and grant probation in these cases, Judge Carter specifically relied on section 5010(a) of Title 18, United States Code, which provides as follows:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

Read in a vacuum, this part of the statute would seem to indicate that the Youth Corrections Act confers plenary power to suspend sentence and to grant probation. However, section 5023(a) of the same

Act, which of course must be read in *pari materia*, provides:

> Nothing in this chapter shall limit or *affect* the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to *amend, repeal, or affect* the provisions of chapter 231 of this title relative to probation (emphasis added).

Section 5023(a) makes it clear that section 5010 (a) does not give the trial court any new or additional power to grant probation—it merely perpetuates in the Youth Corrections Act whatever power to grant probation exists elsewhere. Section 5010(a) is in line with the Congressional purpose that the new methods of treatment of youth offenders be merely optional, and that the courts should be free to continue to use certain established means, including probation, of dealing with these offenders.

This conclusion is strengthened by the Report of the Committee on the Judiciary to accompany S. 2609 —which later became the Youth Corrections Act— (House Report No. 2979, 81st Cong., 2d Sess., p. 3):

> The problem is to provide a successful method and means for treatment of young men between the ages of 16 and 22 who stand convicted in our Federal courts and are not fit subjects for supervised probation—a method and means that will effect rehabilitation and restore normality, rather than develop recidivists . . .
>
> Under its (S. 2609) provisions, if the court finds that a youth offender does not need treat-

> ment, it may suspend the imposition or execution of sentence and place the youth offender on probation. *Thus, the power of the court to grant probation is left undisturbed by the bill* (emphasis added).

Accordingly, the solution to the problem of whether, in a given case, a youth offender may be given probation will not be found in the Youth Corrections Act, but elsewhere; that is, in the statutes dealing specifically with probation as applied to specific offenses. If a statute either permits or prohibits the grant of probation with respect to a type of offense, then such statutory provision is not "affected" (18 U.S.C. 5023 (a)) and is left "undisturbed" (H.Rept. 2979) by the Youth Corrections Act.[4]

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[4] In his opinion denying the Government's motions (Exhibit L, appendix), Judge Carter was concerned about the fact that Public Law 85-752 (85th Cong., 2d Sess.), which extended the treatment provisions of the Youth Corrections Act to offenders between the ages of 22 and 26, contained the following language in its section 7:

> This Act does not apply to any offense for which there is provided a mandatory penalty.

Judge Carter seemed to feel that if Congress had intended that any part of the Youth Corrections Act which covered offenders under the age of 22 should not apply where there is a mandatory penalty, it would have said so.

It must be remembered that the *treatment* provisions (18 U.S.C. 5010 (b), (c)) are the essential part of the Youth Corrections Act. It is these provisions which Congress denied to those offenders between the ages of 22 and 26 who are subject to a mandatory penalty, while it did not deny those provisions to offenders under the age of 22. But this does not affect the probation power.

III

The Narcotics Control Act of 1956 Specifically Prohibits the Suspension of Sentence and Granting of Probation in These Cases.

Title 26, United States Code, Section 7237 (d) provides:

> Upon conviction (1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply.

The offenses of which the defendants were convicted—21 U.S.C. 174 and 176(a)—are subsections (c) and (h) of section 2 of the Narcotic Drugs Import and Export Act, as amended, referred to in 7237 (d) above.

It is apparent not only that Congress clearly intended that the prohibitions of section 7237 (d) should apply to both adult and youthful first-offenders, but that this section was especially directed at the youthful offender. A typical comment is found in House Report No. 2388 of the Committee on Ways and Means to accompany H.R. 11619 (at p. 64):

> . . . We have adduced substantial evidence that because of the severe penalties on repeating of-

> fenders and the fact that suspension and probation are not available in the case of an individual with a record of prior narcotic convictions there has been an increase in first offender traffickers. Repeating offenders subject to the heavier mandatory penalties under the Boggs law have moved into the background and recruited *young* hoodlums as peddlers in the narcotic traffic. These recruits are subject to the minimum mandatory sentence of 2 years with the possibility of suspension or probation . . . The majority of these individuals have prior records of crime . . . With the possibility of receiving probation or a suspended sentence, these unscrupulous individuals are willing to risk apprehension for the fantastic profits derived from this type of crime . . . Unless immediate action is taken to prohibit probation or suspension of sentence, it is the subcommittee's considered opinion that the first-offender peddler problem will become progressively worse and eventually lead to the large-scale recruiting of our *youth* by the upper echelon of traffickers (emphasis added).

The Youth Corrections Act was passed in 1950, the Narcotics Control Act in 1956. Since it is the later in point of time, the Narcotics Act should be considered as controlling in its effect on issues in common between the two statutes. *United States* v. *Yugonovich*, 256 U.S. 450, 463 (1920). Congress first gave the courts the power to grant probation in 1925. The Youth Corrections Act recognized the existence of this power in general terms, making it clear that it was not changing the power of the courts to use this device in lieu of the provisions of the Act. Thereafter, the Narcotics Control Act specifically re-

voked a portion of this power with respect to probation. Under applicable principles of statutory construction, the specific mention in the Narcotics Act of the matter of probation in the case of narcotics offenders must, of course, prevail over the general treatment of all types of offenses in the Youth Corrections Act. *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1943); *United States* v. *Gross*, 159 F. Supp. 316, 318 (D. Nev. 1958).

IV

The Youth Corrections Act May Still Be Used to Effect Rehabilitation and Treatment of These Offenders.

The Youth Corrections Act provides the court with the means to alleviate any situation in which either the law or the facts require that the severity of the narcotics laws be tempered with an effort at rehabilitation. Section 5010(b) of 18 U.S.C. provides as follows:

> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General, for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter.

The "treatment and supervision" would include observation, study, and classification at an appropriate center or agency (section 5010 d); treatment at "training schools, hospitals, farms, forestry and other

camps, and other agencies that will provide the essential varieties of treatment" (section 5011). It might also include a recommendation that the committed youth offenders be "released conditionally under supervision" (section 5015), which could result in unconditional release within a year, depending on the progress made (section 5017). Should these youthful offenders be thus unconditionally released prior to the expiration of the maximum sentence imposed on them, they would be entitled to have their conviction automatically set aside and a certificate issued to that effect (section 5021). It is apparent that adoption of the construction advocated herein will not result in the imposition of the mandatory narcotics sentences on all youth offenders. The treatment provisions of section 5010(b) may be invoked by the sentencing court in any case in which leniency appears warranted.

CONCLUSION

This writ of mandamus is sought as the only means available to compel Judge Carter to exercise the judicial discretion entrusted to him in accordance with the specific directive of the Narcotics Act. It is respectfully requested that the writ issue.

W. WILSON WHITE,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

HAROLD H. GREENE,
GERALD P. CHOPPIN,
Attorneys.

JUNE 1959.

APPENDIX

INDEX TO PETITIONER'S APPENDIX

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 27584-SD

INFORMATION

(U.S.C., Title 21, Sec. 176(a)-
Smuggling of Marihuana)

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

ALBERT EDWARD SMITHSON, JR., ROBERT EMIL AUSTIN, DEFENDANTS.

The United States Attorney charges:

On or about May 18, 1958, in San Diego County, within the Southern Division of the Southern District of California, defendants ALBERT EDWARD SMITHSON, Jr., and ROBERT EMIL AUSTIN, with intent to defraud the United States, did knowingly smuggle and clandestinely introduce into the United States from a foreign country, namely, Mexico, approximately two pounds, net weight, of bulk marihuana, which should have been invoiced, and did knowingly import and bring into the United States from a foreign country, namely, Mexico, said marihuana contrary to law, in that said marihuana had not been presented for inspection, entered, and declared and provided by United States Code, Title 19, Sections 1461, 1484 and 1485.

LAUGHLIN E. WATERS
United States Attorney

PETER J. HUGHES
Assistant United States Attorney

EXHIBIT B

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

No. 27584-Crim.

UNITED STATES OF AMERICA

v.

ALBERT EDWARD SMITHSON, JR.

On this 16th day of June, 1958 came the attorney for the government and the defendant appeared in person and [1] by counsel, Barton Sheela

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] guilty of the offense of smuggling of marihuana in violation of U.S.C. Title 21, Section 176(a) as charged [3] in the Information in one count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is eighteen (18) years of age and is a youth offender. Pursuant to United States Code, Title 18 Section 5010 (a) and in lieu of the penalty of imprisonment otherwise pro-

vided by law for the offense of which the defendant is convicted,

IT IS ADJUDGED that the imposition of sentence is suspended and the defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, report regularly and keep them advised of his residence, and employment, that he does not use or associate with known users of or dealers in barbiturates, marihuana, or narcotics in any form, and that he does not enter Mexico nor approach the Mexican Border without permission from the Probation Department, and that he get a job and maintain regular employment.

JAMES M. CARTER,
United States District Judge.

Filed June 16, 1958 JOHN A. CHILDRESS, *Clerk*
By WILLIAM W. LUDDY, *Deputy Clerk.*

A True Copy Certified this 16th day of June, 1958 (Signed) JOHN A. CHILDRESS, *Clerk* (By) WILLIAM W. LUDDY, *Deputy Clerk.*

EXHIBIT C

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

No. 27584

UNITED STATES OF AMERICA

v.

ROBERT EMIL AUSTIN

On this 16th day of June, 1958 came the attorney for the government and the defendant appeared in person and [1] by counsel, Marvin Mizeur

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] guilty of the offense of smuggling of marihuana in violation of U.S.C., Title 21, Section 176(a) as charged [3] in the Information in one count and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is eighteen (18) years of age and is a youth offender. Pursuant to United States Code, Title 18 Section 5010 (a) and in lieu of the penalty of imprisonment otherwise pro-

vided by law for the offense of which the defendant is convicted,

It Is Adjudged that the imposition of sentence is suspended and the defendant is placed on probation for a period of five years on condition that he obey all laws, Federal, State and Municipal, that he comply with all lawful rules and regulations of the Probation Department, report regularly and keep them advised of his residence, and employment, that he does not use or associate with known users of or dealers in barbiturates, marihuana or narcotics in any form, and that he does not enter Mexico nor approach the Mexican Border without permission from the Probation Department, and that he avail himself of the offer of Mr. Simmons and go to the ranch and follow gainful employment there unless he goes to school in which event he shall attend regularly.

James M. Carter,
United States District Judge.

Filed June 16, 1958 John A. Childress, *Clerk*
By William W. Luddy, *Deputy Clerk.*

A True Copy Certified this 16th day of June, 1958 (Signed) John A. Childress, *Clerk* (By) William W. Luddy, *Deputy Clerk.*

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No.————————-SD Cr

INFORMATION

(U.S.C., Title 21, Sec. 174—
Illegal importation of narcotics)

UNITED STATES OF AMERICA, PLAINTIFF,

-VS-

JEAN HELEN FEAUX, DEFENDANT.

The United States Attorney charges:

On or about November 17, 1958, in San Diego County, within the Southern Division of the Southern District of California, defendant JEAN HELEN FEAUX, did knowingly import and bring into the United States of America from a foreign country; namely, Mexico, a certain narcotic drug; namely, twenty-four grains, net weight, of Heroin, contrary to law.

LAUGHLIN E. WATERS
United States Attorney

PETER J. HUGHES
Assistant United States Attorney

EXHIBIT E

Judgment and Commitment (Rev. 7-52)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

No. 28036-Criminal

UNITED STATES OF AMERICA

v.

JEAN HELEN FEAUX

On this 30th day of March, 1959 came the attorney for the government and the defendant appeared in person and [1] by counsel, Harry D. Stewart

IT IS ADJUDGED that the defendant has been convicted upon her plea of [2] guilty of the offense of illegal importation of narcotics, in violation of U. S. C., Title 21, Section 174, as charged [3] in the Information in one count, and the court having asked the defendant whether she has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is 19 years of age and is a youth offender. Pursuant to United

States Code, Title 18, Section 5010 (a) and in lieu of the penalty of imprisonment otherwise provided by law for the offense of which the defendant is convicted, imposition of sentence is suspended and the defendant is placed on probation for the period of five years on condition that she, either at her own expense or expense of her family, continue the treatment offered by Dr. Lengyel, or such other doctor he may recommend, until such time the doctor feels no further treatment is necessary. It is recommended that said treatment continue for at least one year.

IT IS ORDERED that periodical reports be submitted to the Probation Department showing the progress of the defendant, said reports to be submitted as may be determined by the Probation Department.

JAMES M. CARTER,
United States District Judge.

Filed March 30, 1959 JOHN A. CHILDRESS, *Clerk*
By WILLIAM W. LUDDY, *Deputy Clerk.*

A True Copy. Certified this 30th day of March (Signed) JOHN A. CHILDRESS, *Clerk* (By) WILLIAM W. LUDDY, *Deputy Clerk.*

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 27584-SD Cr

UNITED STATES OF AMERICA, PLAINTIFF,

-VS-

ALBERT EDWARD SMITHSON, JR.; ROBERT EMIL AUSTIN, DEFENDANTS.

ORDER

The above-entitled cause having come on for hearing, pursuant to a motion filed by the Plaintiff to correct the sentence imposed on June 16, 1958, as having been illegal, briefs having been submitted by both the plaintiff and defendant AUSTIN, the Court having heard oral argument and being fully advised in the premises,

IT IS HEREBY ORDERED that the motion by the United States to correct the sentences of SMITHSON and AUSTIN is denied.

This 30th day of March, 1959.

/s/ James M. Carter
United States District Judge

Approved as to form only:

Marvin J. Mizeur

Barton C. Sheela, Jr.

EXHIBIT G

IN THE UNITED STATES DISTRICT COURT
In and For the Southern District of California
Southern Division

No. 28036-SD Cr

United States of America, plaintiff,

-vs-

Jean Helen Feaux, defendant.

ORDER

The Defendant in the above-entitled cause having come before the Court on March 30, 1959, for sentence, the Court having found that the defendant is nineteen years of age and would benefit from treatment under the Youth Corrections Act, imposition of sentence having been suspended and the defendant placed on probation for a period of five years pursuant to the provisions of Title 18, Section 5010(a), and Assistant United States Attorney Peter J. Hughes having moved the Court to correct the sentence as being illegal,

It Is Hereby Ordered that said motion by the United States is denied.

This 30th day of March, 1959.

/s/ James M. Carter
United States District Judge

Approved as to form:

Harry D. Steward

EXHIBIT H

MARVIN J. MIZEUR
Attorney at Law
357 Spreckels Building
San Diego 1, California
BElmont 3-8941

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 27584-SD CR

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

ROBERT EMIL AUSTIN and ALBERT EDWARD SMITHSON, JR., DEFENDANTS,

POINTS AND AUTHORITIES IN OPPOSITION TO THE MOTION TO SET ASIDE THE JUDGMENT AND CORRECT AN ILLEGAL SENTENCE *

The real issue for the Court to determine in this matter appears to be whether or not the Narcotics Control Act of 1956 repealed the Youth Corrections Act of 1950. The defendant, Robert Emil Austin contends that the Narcotics Control Act of 1956 did not repeal the Youth Corrections Act of 1950, and Congress neither stated nor did they intend that such Youth Corrections Act be repealed by the Narcotics Control Act of 1956.

In Cunningham vs U.S., 256 Fed 2d 467 at Page

* These Points and Authorities were the only pleading filed by Austin and Smithson.

471, in footnote 4, quoting Chief Judge Phillips, during hearings before a Sub-Committee of the Senate Judiciary Committee on a "Correctional System for Youth Offenders" 81st Congress, First Session, he stated as follows:

> "As stated in the House Report, the statute (Youth Corrections Act) is designed to make available for the discretionary use of the Federal Judges the system for sentencing and treatment of youth offenders that would promote the rehabilitation of those who show promise of becoming useful citizens and so will avoid the degenerative and needless transformation of many of those persons into habitual criminals. . . . It marks a departure from the punitive idea of dealing with criminals and looks to the objective idea of rehabilitation."

The Youth Corrections Act borrows from the Youth Authority Statutes in California, Minnesota, Wisconsin, Massachusetts and Texas, and from a model act proposed by the American Law Institute in 1941.

In a California case entitled in RE Berrera, 23 Cal 2d 206 at Page 213, the Court in commenting on the reasonableness in the classification of those who may be sent to the Youth Authorities stated:

> "The great value in the treatment of youth offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be responsive to good influence as it is susceptible to bad.

The California case and the House Report indicates the purposes behind the Legislature and the Congress

in enacting the Youth Corrections Acts. It becomes clear that they did intend and did in fact make a separate and distinct classification and a separate and distinct manner of handling youth offenders, if in the opinion of the Judge sitting on the case, it was to the advantage and benefit of the youth to be given the advantage of the measures available under the Youth Corrections Act and the Youth Authority Acts.

In the case of Cunningham vs. U.S., the Court stated, among other things, that the Youth Correction Act is based upon modern and improved penological views and methods of affording youthful offenders, in the discretion of the Judge, opportunity to escape from the physical and psychological shocks attendant upon serving an ordinary penal sentence, and Congress could make general distinction between treatment of persons over, and those under, 22 years of age.

In Title 18 USC 5010(a), the code states:

> "If the Court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence, and place the youth offender on probation."

The above is a part of the Youth Corrections Act of 1950. The Narcotics Control Act of 1956 is silent as to the effect it has upon the Youth Correction Acts. At a glance in the code it will become evident, that when Congress intends to affect by new legislation, some older legislation, it makes reference to that fact in the enactment. By way of example, in 26 Sec. 7237B, Sub Sec. 2 of the Internal Revenue Code, that section states, among other things, that the imposition or execution of sentence shall not be suspended (upon conviction of designated offense) probation shall not be granted, Section 4202 of Title 18 USC shall not

apply and etc. Without quoting, but by reference only, Title 18 Sec. 5026 again specifies the intent of Congress as to whether or not the new enactment shall affect related laws or activities. This is just a few examples of legislation or enactments by Congress, wherein they specifically state when other and older enactments shall be affected by new legislation. It is an old axiom of statutory construction that repeals by implication are not favored. No where in the Narcotics Control Act of 1956 does there appear a statement directly or by inference, that Congress intended that the Youth Corrections Act be repealed in part or in total, by the said Narcotics Control Act of 1956. The Courts' attention is also called to the fact that Congress in enacting 18 U S C 4209 (An act authorizing the use of Youth Corrections Act for those from ages 22-26) did state that said code section would not be applicable to any offense for which there is provided a mandatory penalty, but Congress was silent as to the effect that this section would have upon youths from the age of 18 to 22.

It is the contention of the defendant Robert Austin that Congress, in enacting the legislation states what they mean, and when they are silent on any given matter, it is not to be implied that they intend to repeal by implication.

The defendant Robert Austin also respectively submits to this Court the suggestion that the Attorney Generals' office may have not considered thoroughly their actions in this type of proceeding before they sent out their orders to the various districts. That what they term to be illegal sentences, must be corrected. It is the defendants belief that had further consideration been given, the Attorney Generals' office would have considered the fact that the present order and the present motion before the Court can do

irreparable harm to the youth offenders who have previously been before this Court, and have been considered by this Court to be proper probationary subjects. The defendant Robert Austin, respectively submits that he has been on probation, under this Courts' order for nine (9) months, and has rehabilitated in a proper manner and has complied substantially with the requests of the Probation Department and with the order of the Court. It is respectively submitted that more attention should be given by the Attorney Generals' office to their present request. It is believed that a more proper approach to the present problem would be to make an order to the various districts effective as of the time the order is given, in regard to future sentencing and probation requests, if it is the conviction of the U S Attorney Generals' office, that probation cannot be granted under the violations to which the defendant Robert Austin pleaded, namely USC 21, Sec. 176(a).

The defendant, Robert Austin respectively requests the Court to deny the motion of the U S Attorneys' office to have the previous sentence and probationary term set aside.

Respectively submitted

Attorney for Defendant
Robert Austin

EXHIBIT J

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 28,036 - Criminal

UNITED STATES OF AMERICA, PLAINTIFF,

VS.

JEAN HELEN FEAUX, DEFENDANT.

POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR PROBATION UNDER THE YOUTH CORRECTIONS ACT *

The government contends, and the defendant concedes, that the Narcotics Control Act of 1956 suspended the operation of Chapter 231 of Title 18 (Probation, Sections 3651, et seq.) as to defendants who were convicted of certain narcotic offenses including Section 174 of Title 21 United States Code. It is submitted that the real question for the court to determine is whether or not the Narcotics Control Act of 1956 repealed the Youth Corrections Act of 1950 as to all of those so convicted. It is the defendant's position that Congress did not intend to, and in fact did not, repeal the Youth Corrections Act.

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* These Points and Authorities were the only pleading filed by Jean Feaux.

The Youth Corrections Act was under study for some ten years prior to its enactment in 1950.

> As stated in the House Report, the statute is designed to make available for the discretionary use of the Federal Judges a system for the sentencing and treatment of youth offenders that will promote the rehabilitation of those who show promise of becoming useful citizens and so will avoid the degenerative and needless transformation of many of those persons into habitual criminals. To that end, it provides for a system of analysis, treatment, and release that will cure, rather than accentuate the anti-social tendencies that have led to the commission of crime. This is done by permitting the substitution of correctional rehabilitation for retributive punishment. It marks a departure from the punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation. House Report No. 2979, 81st Congress, Second Session, Page 1.
>
> In these aims, the Act is based upon principles and procedures developed under what has become known as the Borstal System, which has been in successful operation in England since 1894. It also borrows from Youth Authority Statutes in California, Minnesota, Wisconsin, Massachusetts and Texas, and from a model act proposed by the American Law Institute in 1941.

It is clear that Congress intended to, and in fact did, establish a separate and distinct method and manner of treating those youth who were convicted of offenses between the ages of 18 and 22. See *Cunningham vs. U. S.*, 256 Fed 2d 467 at Page 471, wherein it is stated:

> As pointed out in the Government's brief, the Youth Corrections Act applies to convicted persons under the age of 22 years at the time of the conviction and is designed to provide such persons with correctional treatment looking to their complete rehabilitation in lieu of punishment, that is with preventive guidance and training, and *all of its provisions* are designed, enacted and enforced with that end in view. (Emphasis added).

The court further stated in the *Cunningham* case, at Page 473, as follows:

> While appellant does not here invoke, as indeed he cannot, the protection clause of the Fourteenth Amendment, against the classification of which he complains, it has been definitely settled by the decisions of state courts in states which have such laws and in general by the decision of the Supreme Court of the United States in State of Minnesota ex rel. Pearson vs. Probate Court, 309 U. S. 270, that classifications of the general nature of that involved here are not invalid. These and other cases uniformly hold that: while arbitrary or unreasonable classifications may not be set up, there must be differences in character, condition or situation to justify the distinction; that the distinctions and differences in short must bear a due and proper relation to the classification; the equal protection of the law is afforded if the law in question operates in the same general way on all who belong in the same class. For the same reasons, it will not avail appellant under this record to claim under Bolling vs. Sharpe, 347 U. S. 497, that the due process secured by the Fifth Amendment has been in any way denied him.

The Cunningham decision is very persuasive on the question of whether Congress intended to, and in fact did, establish a separate and distinct method and procedure of dealing with youth. In that case the defendant, in proper, entered a plea of guilty to theft of a radio of a value less than $100.00. This was a misdemeanor charge with a maximum imprisonment of one year. The court, however, found that the defendant was a youth offender and committed him to the custody of the Attorney General pursuant to the provisions of Youth Corrections Act. One year later, the defendant filed a writ of habeas corpus contending that, among other things, he could not be incarcerated for any period longer than the maximum one year provided on the misdemeanor charge. The Fifth Circuit, speaking through Chief Judge Hutcheson, denied the writ of habeas corpus on the general grounds that the Youth Corrections Act controlled rather than the specific charge.

It is understood that the government concedes that 18 U. S. C. 5010(b)(c) may be used by the court in imposing sentence. It is understood that the government's present position is that only Paragraph (a) of 18 USC 5010 is not applicable due to the enactment of the Narcotics Control Act of 1956. It is the defendant's position that the Federal Youth Corrections Act must be considered as standing alone insofar as sentencing provisions and the like are concerned. In enacting the Youth Corrections Act, additional powers were vested in the court in connection with the type of sentence that might be imposed. In fact, the provisions of the Youth Corrections Act are different from the other provisions in the Codes pertaining to punishment.

By way of example, a youth of 19 convicted of a violation of the Dyer Act, can be granted probation

or can be committed for any period that the court might determine up to a maximum of five years. The commitment would be under 18 USC 2312 and the probation would be under 18 USC 3651, et seq. This would be the situation prior to 1950. However, since 1950 the court has still another new and different method to sentence a 19 year old youth convicted of the Dyer Act. The new method is set forth in the Youth Corrections Act and authorizes the court to place the defendant on probation pursuant to the Youth Corrections Act or commit him pursuant to the same Act (18 USC 5010(b), et seq.). Once a defendant has been found by the court to be a youth offender within the meaning of the Act, then the Youth Corrections Act controls. In the hypothetical example, if the 19 year old defendant is placed on probation under the general probationary sections, and thereafter violates his probation, the court of necessity must impose sentence pursuant to 18 USC 2312. However, if the court has found that the 19 year old is a youth offender and places him on probation pursuant to the Youth Correction Act, and he thereafter violates his probation, then the court may impose sentence only pursuant to the Youth Corrections Act and may not revert to 18 USC 2312. *Cunningham* vs. *United States*, 256 Fed 2d 467.

Congress must have intended to create a new and different type of probationary sentence when it included same within the Youth Corrections Act, or the reference to probation in the sentence section would be superfluous. As further indication of Congressional intent, the court's attention is respectfully directed to 18 USC 5023, which states:

> Nothing in this chapter shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place the youth

offender on probation or be construed in any wise to amend, repeal or affect the provisions of Chapter 231 of this Title; (Probation).

It would appear that this means that the court, under appropriate circumstances, could place a 19 year old defendant under probation pursuant to the general probationary sections or the Youth Corrections Act, whichever appeared to be more appropriate.

One of the canons of statutory construction is that repeals by implication are not favored. If the Youth Corrections Act has been repealed by the Narcotics Control Act of 1956, the repeal must have been by implication, as there has never been a clear cut statement of Congress stating that the Youth Corrections Act is no longer applicable.

Congress has, however, stated, in 1958, that 18 USC 4209 (authorizing the use of the Youth Corrections Act for those from ages 22-26) would not be applicable to any offense for which there is provided a mandatory penalty. (Section 7, Public Law 85-752; 72 Stat. 845; Approved Aug 25, 1958). But no mention was made of youths from ages 18 to 22.

Expressio Unies Est Exclusio Alterius.

Congress could have specifically stated that the Youth Corrections Act was not subject to an offense where there was a mandatory penalty. This they have not done. Accordingly, it is respectfully submitted that Congress did not intend to and in fact did not repeal the effect and operation of the Youth Corrections Act in any manner by the enactment of the Narcotics Control Act of 1956.

Respectfully submitted,

HARRY D. STEWARD
Attorneys for Defendant

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

No. 28036-SD Cr

UNITED STATES OF AMERICA, PLAINTIFF,

-VS-

JEAN HELEN FEAUX, DEFENDANT.

NOTICE OF OPPOSITION TO DEFENDANT'S REQUEST FOR PROBATION

Comes now the UNITED STATES OF AMERICA, Plaintiff in the above-entitled cause, by and through its counsel herein, and in addition to the matters submitted on the merits of Defendant's request for probation opposes such request on the following ground:

The Court lacks jurisdiction to suspend execution of the sentence and place the Defendant on probation as a Youth Offender pursuant to the provision of Title 18, United States Code, Section 5010(a). This opposition is based on the records and files in the above-entitled cause and the Memorandum attached hereto.

Respectfully submitted,

LAUGHLIN E. WATERS
United States Attorney

ROBERT JOHN JENSEN
Assistant United States Attorney
Chief, Criminal Division

PETER J. HUGHES
Assistant United States Attorney

MEMORANDUM

Defendant has entered a plea of guilty to a violation of Title 21, United States Code, Section 174; more specifically, to having imported and brought into the United States from Mexico twenty-four grains of Heroin. Section 174 of Title 21 is also identified as sub section c of Section 2, Narcotic Drugs Import and Export Act, as amended, which provides that upon a conviction Defendant shall be imprisoned for a period of not less than five or more than twenty years for a first offense. Section 7237 (d) of Title 26, as amended by the Narcotics Control Act of 1956, provides that upon a conviction for violating sub section c, Section 2, Narcotic Drugs Import and Export Act, as amended: "the imposition or execution of sentence shall not be suspended, probation shall not be granted, . . ." It should be noted that the defendant has plead guilty to a charge of trafficking in narcotics, not simply to possessing narcotics. The legislative hearings which preceded enactment of the Narcotic Control Act of 1956 contains the following: "There would be a prohibition on the granting of probation, suspension of sentence or parole with respect to any of the increased penalties applicable to *traffickers*. These mitigations of sentences would continue to be available in the case of first offender possessor." (H.R. No. 2388, June 19, 1956. USC and Cong. News, 1958, p. 3275; emphasis added). It is submitted that the prohibition against granting probation is also applicable to youth offenders. An examination of the Federal Youth Corrections Act indicates that this legislation added nothing to the powers already possessed by Federal Courts with respect to granting probation. The innovations brought into operation by the Youth Corrections Act are found in Title 18, Section 5010, paragraphs b, c

and e. It is submitted, however, that paragraph (a) of Section 5010 added nothing to the power already held by Federal Courts so far as granting of probation is concerned, and paragraph (a) simply was inserted to clarify the fact that the Youth Corrections Act did not negate the powers granted by Title 18, Section 3651 with respect to probation. Indeed, Section 5023(a) of Title 18 specifically provides: "Nothing in this chapter shall limit or affect the power of any Court to suspend the imposition or execution of any sentence and place a youth offender on probation *or be construed in any wise to amend, repeal or affect* the provisions of Chapter 31 of this Title. [Probation]."

The *sui generous* treatment by Congress of narcotic offenders was again emphasized when Section 4209 of Title 18 was enacted to permit treating defendants between the ages of 22 and 26 under the Youth Corrections Act. Congress, however, specifically provided that new Section 4209 would not be available where there was a mandatory penalty. (Sec. 7, Public Law 85-752; 72 Stat. 845; approved August 25, 1958.)

For the foregoing reasons it is respectfully submitted that the Court is without power to suspend execution of a sentence and place a youth offender on probation under paragraph (a), Section 5010 of Title 18, where such youth offender has been convicted of a violation of Title 21, United States Code, Section 174.

EXHIBIT L

Opinion of Judge Carter Denying Government's Motion to Correct Sentences

THE COURT: Well, I am going to decide the matter. I have read the briefs and I have listened to the arguments and have given it some thought. I haven't any real assurance that I am right. I am trying to separate in my thinking any sympathy I may have for these defendants by reason of the situation that they now find themselves in.

It seems to me that when Congress passed the Youth Corrections Act they set up a whole new system of sentencing in connection with youth offenders. It is true that probation had previously existed, but the statute included a provision on probation. If Congress had desired, they needn't have placed that section in there, unless it was in their thinking part of this plan for youthful offenders—there already was a probationary section. They added Section 5010(a), Section 5010(b), Section 5010(c), Section 5010(d), et cetera.

Now it is clear from the Cunningham case that this Youth Corrections Act cuts clear across the matter of sentencing. In the Cunningham case the defendant was sentenced to a longer time and he was doing a longer time than he would have been doing had he been sentenced under the regular statute. But because he was a youthful offender, it was felt that Congress had so changed the law—that although Congress said that he could do only a year for the particular offense, he got more than a year because he was treated as a youthful offender.

Now the Narcotics Control Act also cut across various existing statutes. It is interesting that in the Narcotics Control Act Congress specified in many

instances, if not in most, the particular sections that were being amended. All through that act you will find references to the particular sections that were being amended. There was no reference to the Youth Corrections Act. Now therefore, if Congress was attempting to cut down the scope of the Youth Corrections Act, it was doing it by implication or it was doing it inadvertently.

Then even more significant is the statute passed, which became effective in August, 1958, where there was set up the category of "Young adult offenders." It is true that Congress didn't make that section a part of the Youth Corrections Act, and as I have already commented they placed it in Chapter 311 of Title 18, the section on Parole, and the section immediately preceding it in the new Act, Section 4208, fixing eligibility for parole, obviously belonged there. They made this Section 4209 of Title 18, and they referred to a defendant who has attained his 22nd birthday but not his 26th. Now, obviously, they were thinking about the Youth Corrections Act, because that is the only place in the law where anybody has any significance attached to them because they are 22.

> "If, after taking into consideration the previous record of the defendant . . . social background, capabilities, mental and physical health, and such other factors as would be considered pertinent, the court finds that there is reasonable grounds to believe that defendant will benefit from the treatment provided under the Federal Youth Corrections Act" (again they refer to that Act) "sentence may be imposed pursuant to the provisions of such Act."

So they were setting up a new category of young adult offenders, picking up at age 22 where the so-called youth offender stopped, and they provided that the sentence might be imposed pursuant to the provisions of that Act. And then they went ahead and said, "This Act . . ."—of course, that refers not to the Youth Corrections Act but to Public Law 85-752, but it is the act which set up this category of age 22 to 26—"This Act does not apply to any offense for which there is provided a mandatory penalty." So they had in mind what impact the statute would have on the problem of sentences under the Youth Corrections Act, and they provided that this would not apply where they was a mandatory penalty.

Now what they did is not unreasonable. There is a difference between the person who is between 18 and 22 and the person between 22 and 26. It is not unreasonable to assume that Congress intended that the two classes would be treated differently; that as to those between 22 and 26 the provisions of the Federal Youth Corrections Act, a wide act cutting across various statutes, would still control, but that as to those between 22 and 26, although the sentencing provisions of the Federal Youth Corrections Act were adopted, nevertheless none of the provisions in the Youth Corrections Act could be used if there was a mandatory penalty.

Now, trying to decide what Congress had in mind when a statute was passed is a difficult thing. The Government's argument seems to be based largely upon the fact that at the time the Youth Corrections Act was adopted there already was a provision in effect for probation. If that is true, Congress had no need even to put in Section 5010(a). If they didn't intend that this was a unified plan or scheme for handling youthful offenders they had no need to repeat it.

The provisions of the Youth Corrections Act hang together pretty well.

It seems to me that in view of the fact that the Youth Corrections Act cut across various other statutes—I have been trying to think of some mandatory provision where I might see the impact of it. The one I picked on doesn't work out.

Certainly, they had intended that a youthful offender could get more time than he could get under the statute which Congress had previously passed defining the crime, because he was being treated as a different kind of person—he was being treated not as a criminal who would serve some time and receive the treatment ordinarily afforded, but he was being treated as a youthful offender, a different type of category. If Congress had intended the Narcotics Control Act to mean that probation could not be given to a youthful offender, they could have made reference to the statute. They referred to various other statutes.

More than that, I feel serious doubt that Congress intended that the mandatory sentences provided by the Narcotics Control Act were to apply to youthful offenders.

So I am going to deny the Government's motion.

This may eventually create some hardship on these defendants. If the situation arises and I am reversed in this matter and you come back and I have to sentence them, I hope that the Government will still be of the position that Section 5010(b) is available and that the Attorney General could take into account what they have done on the probationary period that they have been serving and he well might provide some very short period of time to be served. On the other hand, if the defendants had not made good during this period when this appeal is being

processed, of course they could take an entirely different attitude.

I am not without doubt in this matter. There are certainly no guideposts to go by on the matter.

The motion in Case No. 27584 is denied.

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